IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 45.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, *Petitioner,*

v.

FELT & TARRANT MFG. CO.

On Writ of Certiorari to the Supreme Court of the State of New York.

BRIEF FOR THE RESPONDENT.

NEWTON K. FOX,
Attorney for Respondent.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of the Argument	6
Argument	7
I. The Power of New York City to Levy a "Sales Tax" is Necessarily Restricted to Purely Local Sales	7
II. The Sales Were Not Local and Are Therefore Not Taxable Under the New York City Sales Tax Law	8
III. Taxation of These Sales is Prohibited by Article I, Section 8, Clause 3, of the Constitution of the United States	10
IV. The Protection of the Commerce Clause Extends to All Contracts, Negotiations and Sales of goods Shipped in Interstate Commerce	12
V. The New York City Sales Tax, by Erroneous Administration, Becomes a Burden on Interstate Commerce	16
VI. There is No Discrimination Against New York Manufacturers and Merchants by Invalidating the Tax Herein	19
VII. The Invalidation of the Tax Under the Particular Facts of this Case Will Not Conflict With Prior Decisions of this Court	20
(a) The "Use" Tax Cases	20
(b) The "Sales" Tax Cases	21

Page

(c) The "Gross Receipt", "License" or "Privilege" Tax Cases 22
(d) The "Privilege", "Excise" and "Use" Tax Cases 23

VIII. Factual Distinctions Present in the Case at Bar. 24

Conclusion 25

Appendix A—Enabling Act 26

Appendix B—City Sales Tax Act 27

Appendix C—City Personal Property Tax Act 29

TABLE OF CASES.

Adams Mfg. Co. v. Storen, 304 U. S. 307 ..... 16, 23
Alpha Cement Co. v. Massachusetts, 268 U. S. 203 .. 12, 14
Anglo-Chilean Corp. v. Alabama, 288 U. S. 218 16
Bacon & Sons v. Martin, 305 U. S. 380 24
Banker Brothers Company v. Pennsylvania, 222 U. S. 210 ..... 21, 22
Brennan v. Titusville, 153 U. S. 289 11
Caldwell v. North Carolina, 187 U. S. 622 ..... 11, 25
Cheney Bros. Co. v. Massachusetts, 246 U. S. 147 12
Cooney v. Mountain States, T. & T. Co., 294 U. S. 384. 13
Coverdale v. Pipe Line Co., 303 U. S. 604 23
Crenshaw v. Arkansas, 227 U. S. 389 ..... 11, 25
Currin v. Wallace, 306 U. S. 1 12
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 12
Dozier v. Alabama, 218 U. S. 124 ..... 11, 25
Edelman v. Boeing Air Transp., 289 U. S. 249 24
Federal Trade Commission v. Pacific States Paper Trade Ass'n, 273 U. S. 52 12
Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62 20
Foster Packing Co. v. Haydel, 278 U. S. 1 15
Graybar Electric Co. v. Curry, 189 So. 186, 308 U. S. — 22
Gregg Dyeing Co. v. Query, 286 U. S. 472 24
Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 ..... 15, 16, 17
Helson v. Kentucky, 279 U. S. 245 13
Henneford v. Silas Mason Co., 300 U. S. 577 21

Page

Highland Farms Dairy v. Agnew, 300 U. S. 608..... 13
Kidd v. Pearson, 128 U. S. 1 12
Lemke v. Farmer's Grain Co., 258 U. S. 50..... 12
Matter of National Cash Register Co. v. Taylor, 276 N. Y. 208 .....6, 9, 10
Matter of West Publishing Co. v. Taylor, 276 N. Y. 535 11
McGoldrick, Comptroller v. National Cash Register Co., 303 U. S. 656 .....9, 10
McGoldrick, Comptroller v. West Publishing Co., 303 U. S. 656 11
Minnesota v. Blasius, 290 U. S. 1 23
Monamotor Oil Co. v. Johnson, 292 U. S. 86..... 24
Moore v. N. Y. Cotton Exchange, 270 U. S. 593..... 24
Nashville C. & St. L. Ry. Co. v. Wallace, 288 U. S. 249. 24
National Labor Relations Board v. Fainblatt, 306 U. S. 601 14
Pacific T. & T. Co. v. Gallagher, 306 U. S. 182..... 20
Postal Tel.-Cable Co. v. Richmond, 249 U. S. 252..... 24
Real Silk Mills v. Portland, 268 U. S. 325.....12, 13
Rearick v. Pennsylvania, 203 U. S. 507.....11, 25
Robbins v. Shelby County Taxing District, 120 U. S. 665 .....11, 12
Shafer v. Farmer's Grain Co., 268 U. S. 189..... 12
Sonneborn v. Cureton, 262 U. S. 506..... 12
Southern Pacific Co. v. Gallagher, 306 U. S. 167..... 20
Stewart v. Michigan, 232 U. S. 665.....11, 12
United States v. Rock Royal Co-op., 307 U. S. 533.... 12
Ware & Leland v. Mobile County, 209 U. S. 405.....12, 24
Western Live Stock v. Bureau, 303 U. S. 250..... 23
Wiloil Corporation v. Pennsylvania, 294 U. S. 169...21, 22

STATUTES.

Laws of the State of New York, Chapter 873, Appendix A 2, 6, 8, 9, 26
New York City Sales Tax Law, Appendix B, 2, 6, 7, 8, 9, 16, 27
New York City Personal Property Tax Law, Appendix C 2, 7, 29
Illinois Retailers Occupational Tax 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 45.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, *Petitioner*,

v.

FELT & TARRANT MFG. CO.

On Writ of Certiorari to the Supreme Court of the State of New York.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The memorandum opinion of the Court of Appeals is reported in 279 N. Y. 678, 18 N. E. (2d) 311, and the opinion of the Appellate Division is reported in 254 App. Div. 246, 4 N. Y. S. (2d) 615.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925. Petition for a writ of certiorari was granted June 5. 1939.

QUESTION PRESENTED.

Are sales of goods manufactured in Chicago, Illinois, by an Illinois corporation, which is not authorized to do business in the State of New York, subject to the New York City "Sales Tax" where acceptance of the order for the goods must be and is approved in Chicago, the goods are appropriated to the order in Chicago, and are then shipped in interstate commerce to the customer in New York City?

STATUTES INVOLVED.

Laws of the State of New York, Chapter 873 of the Laws of 1934, as amended. (Cahill's Consolidated Laws of New York 1931-1935 Supplement, page 798).

New York City "Sales Tax", Local Law No. 20 (published as No. 21, p. 143) as amended by Local Law No. 24 (published as No. 25, p. 164) of the Laws of 1934 of the city of New York.

New York City "Personal Property Tax", Local Law No. 25 of 1934, No. 31 of 1935, No. 28 of 1936, No. 21 of 1937, No. 28 of 1938 of the city of New York.

Pertinent excerpts are found in the "Appendix" hereto, A, B, and C.

STATEMENT.

This case involves a New York City "Sales Tax" illegally collected from an Illinois manufacturer, not qualified to do business in the State of New York, on sales in interstate commerce.

The facts are set out in the opinion of the Appellate Division. (R. 78-80)

The taxpayer, Felt & Tarrant Mfg. Co. is a corporation organized under the laws of the State of Illinois. Its factory and principal office and place of business is located in Chicago, Illinois. It is engaged in the business of manufacturing and selling adding and calculating machines known as "Comptometers". (R. 3, 25, 32, 78-79)

Felt & Tarrant Mfg. Co. has not qualified to do business in the State of New York. (R. 3-4, 31, 60, 78-79)

All manufacturing is done at Chicago, Illinois (R. 32, 79) The Company has *no* manufacturing plant in the State of New York (R. 25, 79); *no* warehouse or other depository in the State of New York (R. 28, 79) and *no* stock of machines on hand in New York City from which sales are made. (R. 28, 32, 38, 40, 45, 46, 79)*

The Company reserves the sole and exclusive right to sell comptometers. (R. 51)

The Company maintains an office in New York City for the purpose of soliciting orders for comptometers. (R. 32, 79).** It employs a principal and sub-solicitors to solicit orders for comptometers from customers in the City of New York. (R. 33, 79) They have the sole and exclusive right to solicit orders. (R. 51)

Solicitors operate under a written agreement with the Company. (Exhibit 2, R. 54-58, 79) Under the terms of the agreement the duties of solicitors are restricted *solely* to the solicitation of orders. (Exhibit 2, par. 1, R. 56-57, 79) Solicitors have no power to accept an order (R. 39) or to collect money for an order. (Exhibit 2, par. 5, R. 57)

The Company uses a standard form of order blank (R. 26-27, 79, Exhibit 1, R. 53). All orders must be addressed to "Felt & Tarrant Mfg. Co., Chicago, Illinois" (R. 37, 79, Exhibit 1, R. 53) and on the face of the order blank is printed: "All orders subject to the acceptance of an officer of the Company in Chicago". (R. 53, 79)*** All orders received must be approved by an officer of the Company, at Chicago, Illinois, and an order cannot be filled without

*The graphic description of "workrooms," "stockrooms" and "storage facilities" found on pages 3-4 of the City's Brief are not warranted by the findings below (R. 78-80) or by the evidence.

**The statement on page 3 of the City's Brief that "There it sells, * * * comptometers" is not warranted by the findings below (R. 78-80) or by the evidence.

***Statements to the contrary on page 4 of the City's Brief are misleading.

such approval. (R. 27-28, 39, 40, Exhibit 2, par. 1, R. 56-57)*

After approval the order goes to the Billing Department, at Chicago, where an order is made out on the Shipping Department at Chicago, Illinois, for the shipment of a comptometer. (R. 27, 29, 30, 79, Exhibit A, R. 58) A comptometer is then allocated, by Serial Number, to the order by the Shipping Department, at Chicago, and the individual Serial Number of the Comptometer, so appropriated to the order, is inserted in the upper right-hand corner of the shipping order. (R. 27, 30, 79, Exhibit A, R. 58) The complete, assembled, machine is then packed in an *individual carton* for shipment to the purchaser. (R. 39, 79) The shipping order, at Chicago, is then turned over to the Billing Department, at Chicago, where an "Invoice" is made out at Chicago, for the specific "comptometer" by Serial Number of the machine appropriated to the individual customer's order. (R. 30, 79, Exhibit B, R. 59)

The invoice is mailed from Chicago to the customer showing the Serial Number of the specific Comptometer shipped. (R. 30, 79, Exhibit B. R. 59) The Invoice states on its face: "Make All Checks Payable to Company—Remit Directly to Chicago". (R. 59, 79)

All remittances are sent direct to Chicago and all collections are made at Chicago, Illinois. (R. 30, 79) *No* billings are sent from and *no* collections are made in New York City. (R. 30, 79)

The Comptometers are shipped in interstate commerce by common carrier, express, freight or motor service to the customer (R. 28, 41) packed in individual separate cartons. (R. 39, 79)

Prices for machines and trade-in values are fixed by the Company at Chicago (Exhibit 2, pars. 4 and 7, R. 57) and prices quoted by solicitors are subject to checking at Chicago. (R. 38)*

---

*Statements to the contrary on pages 4-5 of the City's Brief are misleading.

No Comptometers at the New York office are available for sale. (R. 28, 32, 38, 40, 45, 46, 79) The Comptometers at the New York office are used only for repair loans, trials and demonstrations. (R. 37, 40, 47, 48, 79-80) These machines are *never* sold to customers in New York City. (R. 32, 37-38, 45, 46, 47)

Comptometer Company, a Delaware Corporation, and a subsidiary of taxpayer, is authorized to do business in the State of New York. (R. 60, 80)

Servicing of the comptometers under the one year guarantee and repairs to machines after the guarantee period had expired, were until August 31, 1935, performed by Felt & Tarrant Company, and after that time they were performed by Comptometer Company. (R. 33-34, 14 C, Doc. 3)

Sales tax returns have been filed and New York City "Sales Taxes" have been paid on all charges for repair work and services to Comptometers performed in New York City and for all local sales of parts and local rental of machines during the taxable period in suit. (R. 40-41, 51)

The Comptroller of the City of New York assessed additional "Sales Taxes" and interest of $3,122.53 against Felt & Tarrant Company on alleged taxable sales (R. 72-73); the assessment was involuntarily paid under protest and duress (R. 8-9); application was filed for a refund of the taxes and interest paid (R. 10-11); and refund was denied. (R. 74-75)

An order of certiorari was granted by the Supreme Court, New York County, to review the determination of the Comptroller. (R. 2-3)

The Appellate Division, First Judicial Department, sustained the order of certiorari and annulled the determination of the Comptroller in the sum of $2,9737.98, the taxpayer having admitted that an additional tax of $148.55 was due for rental of machines to the Comptometer Company and on sales of parts. (R. 76-80)

The Court of Appeals affirmed the Appellate Division (R. 90) on the authority of its prior decision in *Matter of National Cash Register Co. v. Taylor*, 276 N. Y. 208.

A petition for a writ of certiorari was granted June 5, 1939.

SUMMARY OF THE ARGUMENT.

The power of the City of New York to levy a sales tax is necessarily restricted to purely "local" sales. The sales here taxed were not local but exterritorial being consummated in Chicago, Illinois, where the specific machine, by serial number, was appropriated to the order of the customer and was shipped in interstate commerce.

The Enabling Act and the City "Sales Tax" Act expressly exempt taxation of sales in interstate commerce. The New York Courts have held that these particular sales were made in interstate commerce and were therefore exempt from local taxation.

The protection of the commerce clause extends to all contracts, negotiations and sales of goods shipped in interstate commerce which includes buying and selling of commodities for shipment across a state line. A burden on interstate commerce exists where any of these negotiations, sales or intercourse is impeded by State legislation.

By erroneous administration the New York City "sales tax" becomes a burden on interstate commerce by levying the tax upon an Illinois manufacturer for sales in interstate commerce. Not only the "risk" of double taxation but multiple taxation in fact will result. The power exerted by the City of New York to compel an Illinois manufacturer to file returns and reports, to submit its books for inspection, to keep accounts, to pay the tax or act as a collection agency for the City, is beyond its jurisdiction and places a direct burden on interstate commerce.

There is no discrimination against New York City manufacturers and merchants because they do not and cannot sell "comptometers." The City can avoid any discrimination

by collecting a personal property tax from New York City purchasers.

The "Use Tax," "Sales Tax," "Gross Receipts Tax," "License," "Privilege" and "Excise" tax decisions of this Court are distinguishable by reason of the nature of the taxes there levied as well as by the differences in the facts.

ARGUMENT.

I. The Power of New York City to Levy a "Sales Tax" is Necessarially Restricted to Purely Local Sales.

New York City has enacted a "sales tax" and as supplementary thereto a "personal property tax".

The "sales tax" is necessarily restricted by the Enabling Act (Appendix A) and the Sales Tax Act itself (Appendix B) to purely local sales and excludes sales involving transportation in interstate commerce.

The "personal property tax", (Appendix C) levied at the same rate as the sales tax, applies to the local ownership, possession or use of property whether or not the goods were transported in interstate commerce.

Thus if a resident of New York City orders a piano from a Boston manufacturer a sales tax cannot be legally collected but a personal property tax may.

The instant case is before this Court simply because the City taxing authorities choose to illegally collect a sales tax from a foreign manufacturer, not qualified to do business in the State of New York, upon a foreign sale, made in the State of Illinois, with the resulting transportation of the goods in interstate commerce instead of legally collecting a personal property tax from the local New York City purchaser.

Under the above Local Laws the Comptroller has ample authority to legally collect from the purchasers of Comptometers any taxes due without the loss of any revenue to the city. But the Comptroller, instead of using the laws at his command, insists upon illegally collecting sales taxes

from the Illinois manufacturer and in so doing deliberately imposes a burden on interstate commerce. That he need not and cannot do.

The Local Laws are designed to avoid any discrimination as between local and foreign merchants when properly administered.

The plea of loss of revenue raised by the City in its brief is wholly unfounded as applied to the facts of this particular case. The City has found it easily possible to collect a tax from the New York purchasers of Comptometers. (Document No. 13, R. 71-72; Document No. 14, R. 72-73)

II. The Sales Were Not Local and Are Therefore Not Taxable Under the New York City Sales Tax Law.

Under the New York City Local Laws, sales are taxable only if the goods are *sold locally*. Where specific goods are appropriated to an order outside of the City and State of New York and are shipped in interstate commerce, the transaction is *not* a local sale subject to tax. That is the fundamental principle underlying the decided cases.

Where an order for goods is taken in New York City, which order is addressed to and must be approved by the manufacturer seller outside of the City and State of New York the contract of sale is incomplete until acceptance and approval of the order. The place where the order is approved and where specific goods are appropriated to the order establishes the *situs* of the sale and the acceptance of the order completes the contract of sale. In the case at bar, the *situs* was outside of the City of New York.

The Enabling Act, Chapter 873 of the Laws of New York of 1934 restricted the power of the City to the taxation of purely "local" sales.

Section 1 provides:

> "A tax imposed hereunder shall have application only within the territorial limits of any such city * * * ".

It further provides:

> "This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, *notwithstanding that some act be necessarily performed with respect to such transaction within such limits*". (Italics ours.)

The City "Sales Tax" Law expressly exempts sales in interstate commerce.

Section 2 provides:

> " * * * receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax shall not be subject to tax hereunder".

New York City may not, under these laws, tax exterritorial sales effected outside of the territorial limits of the city. The courts below held the sales in the case at bar were not subject to the tax.

In the case at bar the sales were consummated in Chicago, Illinois, the specific goods were appropriated to the sales in Chicago, and the goods were then shipped in interstate commerce. The City cannot exert its taxing powers exterritorially or tax sales in interstate commerce.

As the Court of Appeals said in the case of *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208, certiorari denied, *sub. nom McGoldrick, Comptroller* v. *National Cash Register Co.*, 303 U. S. 656, at pp. 213-214:

> " * * * The rule formulated and applied in these cases brings within the taxing power of the State the products of the petitioner held in stock in New York for sale. A tax imposed by the State on the sale of goods produced here and goods imported from other States is valid. However, the goods delivered under a 'special order' were not within the State when the order was given. The contract of sale did not become effective until the order given in New York was accepted

in Ohio; the goods sold were manufactured in Ohio; they were appropriated to the contract of manufacture or sale in Ohio; they were never held here at the pleasure of the seller for disposal or use; they were sent to the office here of the seller only for delivery to the buyer and as a convenient step in the transportation from the factory of the seller outside the State to the buyer here."

"* * * Here, on the contrary, the contract made outside the State called for the delivery of goods which were manufactured outside of the State and which could not be procured within the State."

III. Taxation of These Sales is Prohibited by Article I, Section 8, Clause 3, of the Constitution of the United States.

The City "Sales Tax" Law expressly exempts sales in interstate commerce.

The sales herein involve interstate commerce. Under the decided cases the taxing thereof was a burden on interstate commerce and beyond the power of the City of New York.

In *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208, 252 App. Div. 90, certiorari denied, 303 U. S. 656, the Court of Appeals said at pages 212 and 213:

"The power of the state of New York to tax receipts derived from transactions in interstate commerce is limited by the provisions of the Constitution of the United States. The power of the city of New York to tax receipts from sales is conferred upon it by statute (Laws of 1934, ch. 873). The power so conferred cannot transcend the limitations imposed upon the power of the state by the Constitution of the United States, and it is restricted further by limitations imposed by the State in the Enabling Act. That act provides expressly that it does not 'authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.'"

In that case the Court also said:

"• • • However, the goods delivered under a 'special order' were not within the State when the order was given. The contract of sale did not become effective until the order given in New York was accepted in Ohio; the goods sold were manufactured in Ohio; they were appropriated to the contract of manufacture or sale in Ohio; they were never held here at the pleasure of the seller for disposal or use; they were sent to the office here of the seller only for delivery to the buyer and as a convenient step in the transportation from the factory of the seller outside the state to the buyer here." • • •

In *Matter of West Publishing Co.* v. *Taylor*, 276 N. Y. 535, certiorari denied, *sub nom McGoldrick, Comptroller* v. *West Publishing Co.*, 303 U. S. 656, the Court of Appeals held the City Sales Tax was *not* applicable on the following facts, saying at page 536:

"• • • Written orders for certain of its publications, directed to petitioner at St. Paul, Minnesota, and subject to its approval, were obtained by its local salesman in New York City during the period from December 10, 1934, to August 31, 1935. In each case such order was sent by its New York office to St. Paul, with any cash deposit that might have been made by the purchaser, for the purpose of approval. Upon the receipt of such orders at St. Paul, the petitioner ascertained the credit responsibility of the purchaser. If the petitioner was satisfied with the purchaser's credit responsibility, the order was filled by petitioner by making shipment of the publication so ordered at and from St. Paul to the purchaser at the address given in the written order."

The principles announced in the above cases are amply supported by the decisions of this Court, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Stewart* v. *Michigan*, 232 U. S. 665; *Dozier* v. *Alabama*, 218 U. S. 124; *Brennan* v. *Titusville*, 153 U. S. 289; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Caldwell* v.

North Carolina, 187 U. S. 622; *Cheney Bros.* v. *Massachusetts*, 246 U. S. 147; *Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203.

A sales tax imposed upon and collected from a manufacturer of goods shipped in interstate commerce is a burden upon that commerce and therefore violates the commerce clause of the Constitution.

IV. The Protection of the Commerce Clause Extends to All Contracts, Negotiations and Sales of Goods Shipped in Interstate Commerce.

Interstate commerce includes the *buying and selling* of commodities for shipment across a state line. *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n*, 273 U. S. 52, 64; *Sonneborn* v. *Cureton*, 262 U. S. 506.

The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. *Real Silk Mills* v. *Portland*, 268 U. S. 325, 333; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Stewart* v. *Michigan*, 232 U. S. 665. Where goods are purchased in one State for transportation to another, the "Commerce" includes the purchase quite as much as it does the transportation. *Currin* v. *Wallace*, 306 U. S. 1, 10.

Where commodities are bought for use beyond State lines, the sale is a part of interstate commerce and both the buying and the selling are interstate commerce and are not subject to State regulation. *United States* v. *Rock Royal Co-Op*, 307 U. S. 533, 569; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290, 291; *Lemke* v. *Farmer's Grain Co.*, 258 U. S. 50, 54-55; *Shafer* v. *Farmer's Grain Co.*, 268 U. S. 189, 198-199; *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 64; *Kidd* v. *Pearson*, 128 U. S. 1, 20; *Sonneborn* v. *Cureton*, 262 U. S. 506.

In *Ware & Leland* v. *Mobile County*, 209 U. S. 405, this Court said at page 412:

"These cases are not in conflict with those in which it is held that the negotiation of sales of goods in a State by a person employed to solicit for them in another State, the goods to be shipped from the one State to the other, is interstate commerce. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; similar cases are *Rearick* v. *Pennsylvania*, 203 U. S. 507, and *Caldwell* v. *North Carolina*, 187 U. S. 622. In these cases goods in a foreign State are sold upon orders for the purpose of bringing them to the State which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject-matter of the dealing is goods to be shipped in interstate commerce; to be carried between States and delivered from vendor to purchaser by means of interstate carriage."

As this Court said in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, at page 615:

"* * * Highland in Washington may sell to High in Virginia, and High may buy from Highland, at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale. Cf. *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 175; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506; *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511. If there could be any doubt about this as a matter of construction, the doubt would be dispelled by the administrative practice and by the warning of the statute, expressed in §14, that operations in interstate commerce shall not be deemed to be affected. * * *"

A like provision as to interstate commerce is contained in the New York City "Sales Tax" Act.

A State cannot lay a tax on interstate commerce in any form. *Cooney* v. *Mountain States T. & T. Co.*, 294 U. S. 384, 392; *Helson* v. *Kentucky*, 279 U. S. 245, 249.

In *Real Silk Mills* v. *Portland*, 268 U. S. 325, solicitors took orders for goods manufactured in another State and collected in advance a payment which was their commission. The orders were sent to the home office for filling and

the goods shipped direct to the customers. In holding that a municipal ordinance requiring a license fee from the solicitors was a burden on interstate commerce and therefore invalid, the Court said at page 335:

> "Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the Commerce Clause. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497; *Brennan* v. *Titusville*, 153 U. S. 289; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Texas Transport Co.* v. *New Orleans*, 264 U. S. 150; *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts*, 268 U. S. 203.
>
> 'The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.' * * * "

The facts in *Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203, where orders were solicited are strikingly similar to those in the case at bar. The excise tax there was held invalid under the commerce clause.

Recently in *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, this Court said at pages 605-606:

> "Here interstate commerce was involved in the transportation of the materials to be processed across state lines to the factory of respondents and in the transportation of the finished product to points outside the state for distribution to purchasers and ultimate consumers. Whether shipments were made directly to respondents, as the Board found, or to a representative of Lee Sportswear Company at the factory, as respondents contend, is immaterial. It was not any the less interstate commerce because the transportation did not begin or end with the transfer of title of the merchandise transported. * * * Transportation alone across state lines is commerce within the constitutional control of the national government and subject to the regulatory power of Congress. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Champion* v. *Ames*, 188 U. S. 321."

And in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, it was said at page 437:

> "We need not stop to consider which, if any, of appellant's activities in carrying on its business are in themselves transportation of the fruit in interstate or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Real Silk Mills* v. *Portland*, 268 U. S. 325; * * * ."

Again in *Foster Packing Co.* v. *Haydel*, 278 U. S. 1, it was said at page 10:

> " * * * In determining what is interstate commerce, courts look to practical considerations and the established course of business. *Swift and Co.* v. *United States*, 196 U. S. 375, 398; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 59; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 198, 200. Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among States. And a state statute that operates directly to burden any of its essential elements is invalid. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 290; *Shafer* v. *Farmers Grain Co., supra*, 199. * * * "

Thus interstate commerce embraces and the commerce clause protects not only shipments and transportation but all negotiations and contracts of sale as well. It extends to all the component parts of that intercourse.

A burden on interstate commerce exists where any of these negotiations, sales or intercourse is impeded by State legislation.

V. The New York City Sales Tax, by Erroneous Administration, Becomes a Burden on Interstate Commerce.

The New York City Sales Tax Act, as such, is not unconstitutional. However, by erroneous administration, in applying its provisions to other than local sales and in particular to sales in interstate commerce, a burden is placed on such commerce in violation of the Commerce Clause.

It must be borne in mind that the tax in the case at bar was imposed upon and collected from a foreign manufacturer and not from a local purchaser in New York City.

That results in a direct burden on interstate commerce because the amount of tax payable by the manufacturer to the City depends entirely upon the amount of interstate business done, namely, 2 per cent on all gross sales made in New York City. It is therefore a direct charge on interstate business and a burden on such commerce.

As this Court recently said in *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, at pages 311-312:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, § 8 of the Constitution * * *."

Also, in *Gwin, White & Prince, Inc.*, v. *Henneford*, 305 U. S. 434, a state tax measured by gross receipts from sales in interstate commerce was held prohibited by the Commerce Clause.

And in *Anglo-Chilean Corp* v. *Alabama*, 288 U. S. 218, the Court held that a tax for the privilege of doing busi-

ness was invalid as repugnant to the Commerce Clause because it was measured by the value of goods imported and thereafter sold in interstate commerce.

To permit the City of New York to levy and collect this sales tax from an Illinois manufacturer, as was done in the case at bar, burdens interstate commerce. The Courts below so held on the facts of this case.

There is also the "risk" of multiple taxation in the case at bar. Such a risk discriminates against interstate commerce and makes the tax repugnant to the Commerce Clause. This principle is recognized in *Gwin, White & Prince, Inc., v. Hanneford*, 305 U. S. 434, where the Court said at pages 439-440:

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal rights, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. (Citing cases.) Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

Not only the "risk" of double taxation but double taxation in fact can result from the taxation to the manufacturer of these sales by the City of New York.*

---

*Felt & Tarrant Mfg. Co. is advised by its New York City customers that on over $50,000 of sales during the tax period in question, a tax has been paid by the customer on sales for which a sales tax was also collected from the Company.

The State of Illinois has a "Retailer's Occupational Tax", enacted June 28, 1933, and still in effect. Smith-Hurd Revised Statutes (1935), p. 2767; Cahill's Statutes, p. 2389. This is "An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption". The tax is based upon gross sales.

New York City says it can tax these sales because they are local there. Suppose on the other hand, that Illinois does not agree with this and says that the sales are local Illinois sales and taxable there. In such a case there is double taxation in fact.

Furthermore, there is no prohibition upon the State of Illinois or the City of Chicago from enacting a "Sales Tax" on these very sales. Again, the Company can be subjected to a personal property tax on the machines and materials which it has on hand in Chicago. If New York City is sustained in taxing these sales then various other legislative bodies in Illinois and New York may levy "Use Taxes," "Gross Receipts Taxes," "License," "Privilege" and "Excise" taxes measured by these very sales. Pandora's box is opened.

If New York City can tax the Company for sales to New York customers then every city in the United States and every State may tax such sales when made to its inhabitants. That situation would immediately raise tariff walls around each city and State of the Union which would be destructive not only of interstate commerce but of the very protection which the Commerce Clause was designed to preserve.

Other burdens on interstate commerce in the case at bar consist of the compulsion, under the sales tax law, of the Comptroller of New York City forcing an Illinois corporation to act as a collecting agency for the city; the compulsion of forcing an Illinois corporation to file returns and reports with the City of New York, and the increased costs of accounting and bookkeeping in connection with such returns and the collection of the tax from the Company's

New York customers. All these burdens can be avoided by the collection by the City of New York of any local taxes from the local New York purchasers in New York City.

The City of New York sent auditors to the City of Chicago to examine the Company's books and records. (R. 62, 63) If the City of New York can do this, then every city in the United States which has a sales tax can send its auditors to the company's offices with the result that the Company's offices would be overrun by investigators, auditors, checkers and others, to the utter disruption of its business.

When the City of New York compels an Illinois corporation, which is not authorized to do business in New York, to act as a collecting agency for the City, compels it to file returns, to make reports, and to incur substantial additional costs and expenses, the City is attempting to exercise its sovereign powers beyond its jurisdiction. That is cannot do without burdening interstate commerce.

VI. There is No Discrimination Against New York Manufacturers and Merchants by Invalidating the Tax Herein.

"Comptometers" are computing machines specially manufactured and sold exclusively by the Company under its own patents. Local New York manufacturers do not and cannot manufacture these machines.

Local merchants and manufacturers cannot and do not make or sell these machines. All sales are made by the Company at and from Chicago, Illinois. To hold that these sales taxes were erroneously collected does not discriminate against any local New York City merchant or manufacturer or in fact any manufacturer in the United States. The unjust discrimination theory, therefore, does not apply to the facts in the instant case as it might where a general commodity is sold in competition with local trade.

The Comptroller himself can avoid any unjust discrimination by collecting a personal property tax from New York City purchasers.

VII. The Invalidation of the Tax Under the Particular Facts of this Case Will Not Conflict With Prior Decisions of this Court.

The City urges that the tax should be sustained under the principles announced in certain recent decisions of this Court. A careful analysis of those cases shows that they are distinguishable both on the facts and because of the particular kind of tax levied.

In all of those cases the tax was sustained because of the "local" nature of the activities separate and apart from interstate commerce.

Those decisions involved "Use" taxes on purely local possession or enjoyment of property; Sales taxes on purely local sales; "Personal Property" taxes on purely local ownership; "License" or "Privilege" taxes for doing a local business; and "Excise" taxes based upon local use or business.

These taxes were sustained because of the "local", intrastate nature of the activity engaged in or because the articles were in "local" use. The taxable event was the local use or possession as distinguished from a tax on the sales of goods in interstate commerce.

(a) The "Use" tax cases.

The case of *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; and *Pacific T. & T. Co.* v. *Gallagher*, 306 U. S. 182; all involved the California "Use Tax"—*not* the California "Sales Tax". This Court held that the "local" use and enjoyment of articles imported from another State was taxable and did not burden interstate commerce.

A "Sales" tax and a "Use" tax differ fundamentally.

A "Sales" tax applies only to a local sale. A "Use" tax, as the name implies, is a tax upon the privilege of owning, using, consuming or enjoying the possession of property and applies to goods, in the hands of the purchaser, owner or user, whether or not they have been trans-

ported from a foreign state or country. In the instant case a "Use" tax, or the corresponding New York City "Personal Property" tax, applies to the New York City purchaser and *not* to the Illinois manufacturer. In the case at bar the City is taxing the Illinois manufacturer for "Sales" taxes and not the New York City purchaser.

The case at bar does *not* involve a New York City *purchaser-consumer* but it *does* involve an Illinois *manufacturer-seller*. The distinction is obvious.

The California decisions would be applicable if a New York City purchaser sued to recover the "Personal Property" tax paid by him on a comptometer upon which the sales tax had not been paid. Because of "local" possession, ownership and use the tax would of course be sustained. Otherwise the cases bear no analogy.

Henneford v. *Silas Mason Co.*, 300 U. S. 577, involved a "use" or "excise" tax on the privilege of using articles imported in interstate commerce which had become part of the common mass of property at rest in the State. It was a tax upon the "local" privilege of "local" use.

(b) The "Sales" tax cases.

Bankers Brothers Company v. *Pennsylvania*, 222 U. S. 210, involved the local sale of an automobile by a local dealer. The contract of sale was executed locally, the purchase price was received locally and delivery was local. This Court distinguished the case of "a sale by the manufacturer at the factory" holding that "the contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price." All of the incidents of the transaction were "local" and constituted a local sale in Pennsylvania.

Wiloil Corporation v. *Pennsylvania*, 294 U. S. 169, involved a tax of 3 cents a gallon levied "upon all liquid fuels used or sold and delivered by distributors within the commonwealth." In that case the company, with its principal place of business in Pittsburgh, sold liquid fuels at

wholesale and was a "distributor" as defined by the Act. The Philadelphia agent of the company ordered 13 tank cars for delivery to purchasers in Philadelphia and Essington, Pennsylvania. The order specified a price per gallon "f. o. b. Wilmington, Del., plus 3 cents tax" and was received at the company's office in Pittsburgh for approval. The company obtained the fuel at Wilmington and *on the order of the company* it was shipped by rail from there to the purchasers in Pennsylvania. This Court said that the commerce clause does not prevent taxation of goods by the State in which they are found merely because brought from another State, and held that an "interstate transportation was not required or contemplated." The sales contracts were made in Pennsylvania, the company was doing business in Pennsylvania and deliveries were made in Pennsylvania. Under such circumstances the whole transaction and all of its incident were local and subject to tax.

(c) The "Gross Receipt", "License" or "Privilege" tax cases.

Graybar Electric Co. v. *Curry*, 189 So. 186, 308 U. S. —, affirmed 60 S. Ct. Rep. 139, on the authority of *Banker Bros. Co.* v. *Pennsylvania*, 222 U. S. 210; and *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169, involved purely "local" sales and is therefore distinguishable on its facts. The tax involved was a "license" tax imposed on local retail dealers measured by "local" gross receipts. Graybar was not a foreign manufacturer but a "local" retail distributor of electrical supplies in Birmingham, Alabama. The orders were addressed to "Graybar Electric Company, 1529 First Avenue North, Birmingham, Alabama." The orders were accepted by Graybar in Alabama. Graybar from Alabama then ordered the goods from General Electric in Ohio. General Electric billed Graybar in Alabama. Graybar in turn billed its Alabama customers and received the purchase price in Alabama. The goods could have been purchased in Alabama from a competitor of Graybar and part of the goods were carried in stock in Alabama. The tax was sus-

tained because of these "local" transactions resulting in the "local" receipt by Graybar of "gross receipts" in Alabama.

Western Live Stock v. *Bureau*, 303 U. S. 250, involved a "privilege tax" measured by gross receipts from "business done" (advertising) locally within the State. This Court held that the tax was "an excise conditioned on the carrying on of a local business." (p. 257) This Court emphasized the fact that the tax did "not embrace the purchase price of the articles shipped in interstate commerce" (pp. 258-259). Receipts from subscriptions to the magazine from without the State and the circulation of the magazine interstate were *not* included in the measure of the tax.

Adams Mfg. Co. v. *Storen*, 304 U. S. 307, involved the Indiana Gross Income Tax based upon "gross receipts derived from trades, businesses, or commerce." This Court held it was a "privilege tax" upon the receipt of gross income and since under the statute interstate commerce would be subjected to the "risk of a double tax burden" the tax was held to be a burden upon such commerce.

Minnesota v. *Blasius*, 290 U. S. 1, involved a personal property tax. Cattle shipped from another State were at rest in the St. Paul stockyards when purchased by the defendant. They were there being held at the pleasure of their owner for disposal or use. This Court held that they had acquired a local "situs", and, being locally owned as part of the general mass of property within the State, the defendant was subject to the personal property tax on such ownership although he later sold and shipped them to another State.

The case last above would be applicable to a New York City purchaser under the New York "Personal Property" tax.

(d) The "Privilege", "Excise" and "Use" tax cases.

Coverdale v. *Pipe Line Co.*, 303 U. S. 604, involved a "privilege" tax on the "local" operation of machines for producing mechanical power. The tax was measured by

the horsepower capacity of the machine used. The tax was laid on a "local" business and a purely local "use".

Nashville C. & St. L. Ry. Co. v. *Wallace*, 288 U. S. 249, involved a "privilege" or "excise" tax on the withdrawal for use of gasoline "locally" stored. The same was true in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, and *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, the latter tax being characterized as a "license fee", an "excise", upon the "local use" of motor fuel in the State.

And *Edelman* v. *Boeing Air Transp.*, 289 U. S. 249, involved a "license" or "use" tax on the withdrawal of gasoline "locally" stored within the State.

Bacon & Sons v. *Martin*, 305 U. S. 380, involved an "excise" tax based upon the "use" of cosmetics locally within the State after importation.

Ware & Leland v. *Mobile County*, 209 U. S. 405, involved a "license tax" on persons engaged in buying and selling cotton futures and this Court held that the business was "local" and subject to tax. (But see the distinction made on page 412 as to orders taken for the sale of goods to be shipped from another State.) The same principles controlled in *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, because of the "local" business done and the "local" nature of the "transactions".

Postal Tel.-Cable Co. v. *Richmond*, 249 U. S. 252, involved a "license tax" on the "local" business done within the City for the "privilege of doing business" therein.

It is submitted that the differences in the nature of the taxes levied, in the cases discussed above, as well as differences in the facts make them clearly distinguishable from the New York City sales tax imposed upon the Illinois manufacturer in the case at bar.

VIII. Factual Distinctions Present in the Case at Bar.

Here the order is directed to a foreign manufacturer in Chicago, Illinois. The order is accepted or rejected in Chicago. The machine by serial number is appropriated to the order in Chicago and is shipped to the purchaser in

interstate commerce. The purchaser is billed from Chicago and remits direct to Chicago. Thus the elements of a "local" sale are lacking and the elements upon which the particular tax was sustained in the cases discussed above are absent.

The attempt of the City to bring the instant case within the principles of the "Use" tax cases fails because New York City has no "Use Tax." Its counterpart, the "Personal Property Tax," can only be employed against the purchaser—not the foreign manufacturer.

Again the principles of the "storage" and "withdrawal" cases have no application because there was no storage or withdrawal. The record shows that the Company did not have extensive storage facilities in New York City used for the storage of machines for "sale" (R. 28, 32, 38, 40, 45, 46) and the only machines stored were used for trials, repair loans and demonstration. (R. 37, 40, 47, 48) These machines are *not* the subject of the sales taxes in issue in the case at bar. Obviously a service machine used for trials, repair loans or demonstration was, by reason of its very use, a second-hand machine. They went in and out every day. (R. 48) Furthermore, the Company did not sell second-hand machines but new machines.

The testing of the machine before delivery to the customer was in furtherance of interstate commerce under the principles of *Dozier* v. *Alabama*, 218 U. S. 124; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Caldwell* v. *North Carolina*, 187 U. S. 622; and *Crenshaw* v. *Arkansas*, 227 U. S. 389.

Servicing of the machine, free of charge, under the one year guarantee has no application in the imposition of a sales tax as it begins after the sale is consummated.

CONCLUSION.

The decisions below are correct and in accord with the decisions of this Court. They should be affirmed.

Respectfully submitted,

NEWTON K. FOX,
Attorney for Respondent.

APPENDIX A.

Laws of New York Provisions of State Enabling Act. Chapter 873.

Section 1. Notwithstanding any other provision of law to the contrary, any city of the State having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending December thirty-first, nineteen hundred thirty-five, or any portion of such period. *A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.* [Italics ours.]

* * *

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits. [Italics ours.]

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within

such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

* * *

APPENDIX B.

Local Laws of the City of New York.
Sales Tax.

For the Year 1934, No. 20 as amended by No. 24.

* * *

§1. Definitions. When used in this local law:

(a) The word "person" includes an individual, copartnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

* * *

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

* * *

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

* * *

§ 2. Imposition of tax. During the period commencing on December tenth, nineteen hundred and thirty-four, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

* * *

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and *receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax shall not be subject to tax hereunder.* [Italics ours.]

* * *

Where a purchaser has failed to pay and a vender has failed to collect a tax upon a sale or service, as imposed by this local law, *then* in addition to all other rights, obligations and remedies provided, *such tax shall be payable by the purchaser directly to the comptroller* and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered. [Italics ours.]

The *comptroller* may, wherever he deems it necessary for the proper enforcement of this local law, *provide* by regulation *that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed,* at such times as returns are required to be filed and payment over made by vendors. [Italics ours.]

APPENDIX C.

New York City Personal Property Tax.

Sec. 1. Imposition of Tax. During the period commencing on January 1, 1935 and ending on December 31, 1935, there shall be paid by the owner a tax of 2 per centum upon the value of the following-named *articles of personal property situated or owned within the City of New York.*

* * *

e. Machinery of every type and variety, including *typewriters and all other business machinery* * * *.

Sec. 2. Exemptions. No tax, as imposed by Section 1 of this title shall be due or payable in any event upon any of the articles enumerated in the said section 1, and no return need be made thereon pursuant to the provisions of this law if any of the following conditions be demonstrated to the satisfaction of the Comptroller.

* * *

c. That the said article is one *upon the receipt from the sale of which a tax has been paid* pursuant ot the provisions of this law or Local Law 20, of 1934, as amended. [The City "Sales Tax"] (Italics ours).

* * *

P. 1-2

SUPREME COURT OF THE UNITED STATES.

Nos. 45, 474.—October Term, 1939.

Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner, vs. Felt & Tarrant Mfg. Co.	On Writ of Certiorari to the Supreme Court of the State of New York.
Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner, vs. A. H. DuGrenier, Inc., Principal, and Stewart & McGuire, Inc., Agent.	On Writ of Certiorari to the Supreme Court of the State of New York.

[January 29, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

These are companion cases to No. 475, *McGoldrick* v. *Berwind-White Coal Mining Co.*, decided this day. As in that case the question for decision is whether the New York City tax laid upon sales of goods for consumption as applied to respondents infringes the commerce clause of the Federal Constitution.

Upon certiorari to review determinations by the Comptroller of the City of New York, that each of the respondents was subject to the tax, the Appellate Division of the New York Supreme Court set the levy aside. *Matter of Felt & Tarrant Mfg. Co.*, 254 N. Y. App. Div. 246; *Matter of A. H. DuGrenier, Inc.*, 255 N. Y. App. Div. 961. The New York Court of Appeals, without opinion, affirmed the judgment in each case, 279 N. Y. 678, 281 N. Y. [illegible], but by its amended remittitur declared that the affirmance was upon the sole ground that the tax infringed the commerce clause of the Federal Constitution. The relevant provisions of the taxing act are set out in our opinion in the *Berwind-White Company* case and need not be repeated here.

608

Respondent, Felt & Tarrant Mfg. Co., an Illinois corporation, with its factory and principal place of business in that state, manufactures and sells adding and calculating machines known as

comptometers. It maintains an office in New York City, from which its agents solicit in the city orders for comptometers, which are forwarded to the Illinois office for approval. If accepted each order is filled by allocating to it the purchased comptometer designated by its serial number. It is invoiced to the purchaser and shipped to the New York City office of respondent's sales agent, where it is inspected, tested and adjusted, and then delivered to the purchaser. Remittances are made by the purchaser direct to the Illinois office. The course of business so far as now material is identical in that of the same company, described in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62.

Respondent, DuGrenier, Inc., a Massachusetts corporation with its factory and principal office in that state, is engaged in the manufacture and sale of automatic vending machines. They are sold throughout the United States by an exclusive sales agent, the respondent Stewart & McGuire, Inc., having an office in New York City. The sales in the city, when not of machines located at the New York office, are effected through solicitations of orders by the agent, which takes from the prospective purchaser a signed order or a contract for a conditional sale on partial payment, which is forwarded by the agent to the Massachusetts office. If accepted there the order is filled by shipping the purchased machine by rail or truck direct to the purchaser in New York City, who pays the freight.

In both cases the tax was imposed on all the sales of merchandise for which orders were taken within the city and possession of which was transferred to the purchaser there. Decision in both is controlled by our decision in the *Berwind-White Company* case. For reasons stated at length in the opinion in that case the tax so laid does not infringe the commerce clause. The judgments will be reversed and the causes remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 45, 474.—October Term, 1939.

Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner, 45 *vs.* Felt & Tarrant Mfg. Co. Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner, 474 *vs.* A. H. DuGrenier, Inc., Principal, and Stewart & McGuire, Inc., Agent.	}	On Writs of Certiorari to the Supreme Court of the State of New York.

[January 29, 1940.]

The Chief Justice, Mr. Justice McReynolds and Mr. Justice Roberts dissent from the judgments in these cases upon the grounds stated in the dissenting opinion in No. 475, *McGoldrick* v. *Berwind-White Coal Mining Co.*